The Invasion of Sexual Privacy

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In Bowers v. Hardwick, *the United States Supreme Court held constitutional a Georgia statute which outlaws sodomy, as applied to homosexuals, but expressed no opinion as to the constitutionality of the statute as applied to heterosexuals. Professor Khan argues that Hardwick's case presented a simple right to privacy issue, which the Court twisted into a moral one. The Article concludes that homosexuals were singled out for moral condemnation at the expense of a fundamental liberty.*

INTRODUCTION

In a recent case, *Bowers v. Hardwick*,[1] the United States Supreme Court ruled five to four that the federal constitution does not confer a fundamental right upon homosexuals to engage in sodomy. Further, a state may criminalize homosexual sodomy even if it is practiced among consenting adults in the privacy of a home. The Georgia statute challenged before the Court outlaws all forms of sodomy, and under its broad language it is legally irrelevant whether the persons who engage in sodomy are homosexuals or heterosexuals, married or unmarried.[2] The Court, in ruling that the statute is constitutional as

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1. 106 S. Ct. 2841 (1986), *reh'g denied*, slip op. 85-140 (Sept. 11, 1986).

2. GA. CODE ANN. § 26-2002 (Harrison 1983) provides:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .

(b) A person convicted of the offense of sodomy shall be punished for not less

applied to homosexuals, expressed no opinion on its constitutionality as applied to other acts of sodomy.[3] Justice White, writing for the majority, gave two distinct reasons to deny a fundamental right to engage in homosexual sodomy. First, the right of privacy pronounced in prior Court cases does not extend to homosexual sodomy.[4] Second, homosexual sodomy is not a fundamental liberty deeply rooted in this Nation's history and tradition;[5] nor is it a fundamental right "implicit in the concept of ordered liberty."[6]

This Article criticizes the majority opinion. It argues that the majority ignored the issue the case presented, and that the decision reached is analytically indefensible. Further, it is submitted that the reasons advanced by the Court are based on legally unacceptable rhetoric and discarded historical morality. It is unfortunate that by invoking notions of muddled morality to resolve an otherwise clear legal question, the Court has made bad law out of a simple case. One can only hope, as Justice Blackmun said in his dissent, that "the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[7]

THE TWISTED ISSUE

Formulating issues carefully and correctly is not only essential for fair resolution of disputes but it is also indispensable for good and honest legal analysis. The dissenting Justices rightly point out that the majority distorted the question the case presented.[8] The issue before the Court was not the morality of homosexual sodomy or, for that matter, the morality of sodomy in general. Nor was the issue whether the Constitution confers upon homosexuals a fundamental right to engage in sodomy. There was little need to frame the issue in morally stark language, much less to embrace the notion that

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than one nor more than 20 years . . . .

3. *Hardwick*, 106 S. Ct. at 2842 n.2. John and Mary Doe, a heterosexual couple, also joined Hardwick as plaintiffs, stating that they wished to engage in sodomy in the privacy of their home, and that they had been "chilled and deterred" from engaging in such sexual activity by both the existence of the statute and Hardwick's arrest. The District Court held that the couple lacked the proper standing to maintain the action because they had neither sustained, nor were in immediate danger of sustaining any direct injury from the enforcement of the statute. The Court of Appeals upheld this judgment. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985). The couple did not challenge the holding in the Supreme Court.

4. *Hardwick*, 106 S. Ct. at 2844.

5. *Id.* at 2844-46.

6. *Id.* at 2844, 2846.

7. *Id.* at 2856 (Blackmun, J., dissenting).

8. *Id.* at 2848.

"majority sentiments about the morality of homosexuality"[9] are adequate to validate the statute. Rhetoric based on popular sentiments serves political ends well, but not the interests of justice. This Socrates taught us centuries ago.[10]

Writing for four members of the Court, Justice Blackmun, in dissent, seems to have been indeed careful to separate sentimental morality from the legal issue before the Court. Avoiding "the Court's almost obsessive focus on homosexual activity,"[11] he frames the issue in terms of whether "Hardwick has stated a cognizable claim that [the Georgia statute] interferes with constitutionally protected interests in privacy and freedom of intimate association."[12] This formulation of the issue, unlike that of the majority's, does not provoke any raw sentiments that one might have against sodomy in general, and homosexuals in particular. It allows analysis of the issue with an unbiased deliberation.

By focusing exclusively upon a twisted issue, the majority creates a classification that an indiscriminate statute does not contemplate. That is, the statute at issue is designed to punish sexual acts involving the sex organs of one person and the mouth or anus of another; it is not aimed at prohibiting exclusively homosexual activity.[13] The statute does not raise the question of whether the persons engaged in anal or oral sex are homosexuals or heterosexuals, married or unmarried. These classifications are unnecessary precisely because the statute focuses upon the act of sodomy, not upon the social identity of sodomites.

To argue that the statute is applicable to a certain group of sodomites, but not to others, amounts to rewriting the statute, which the Court does not pretend to do. Nor does the Court give reasons to show why a selective application of the statute is justified. Justice Stevens said:

> Either the persons to whom Georgia seeks to apply its statute do not have the same interest in 'liberty' that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.[14]

One might appreciate the skillful generosity of a court when it

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9. *Id.* at 2846.
10. PLATO, GORGIAS (W. Hamilton trans. 1960); *see also* J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984).
11. *Hardwick*, 106 S. Ct. at 2849.
12. *Id.* at 2850.
13. GA. CODE ANN. § 26-2002 (Harrison 1983).
14. *Hardwick*, 106 S. Ct. at 2858 (Stevens, J., dissenting).

construes a statute to confer a special benefit upon a socially disadvantaged group.[15] It is unsettling jurisprudence, however, when a court construes a criminal statute to inflict special harm upon a politically weak group.[16] Fairness demands that a criminal statute *not* be selectively applied in a manner that singles out a particular group and then exposes it to the full wrath of a statute designed to be applicable to all. A discriminate enforcement of a criminal statute against a socially disfavored group is bad jurisprudence;[17] especially in a legal system that distinguishes itself on grounds of democratic equality and individual liberty.

Although the Court did not express its opinion on the constitutionality of the statute as applied to heterosexual adults, one may infer that the Court deliberately avoided formulating the issue as focusing upon sodomy in general. Justice Stevens, in his incisive dissent, correctly pointed out that under the ruling of *Griswold v. Connecticut*,[18] a state may not prohibit sodomy within the "sacred precincts of marital bedrooms."[19] Likewise, any such prohibition among unmarried heterosexual adults would be equally unconstitutional under the pro-

15. Justice White, who wrote the majority opinion in *Hardwick*, made an interesting argument in Griswold v. Connecticut, 381 U.S. 479 (1965), to show that the Connecticut anticontraceptive statutes violated the fourteenth amendment because they denied "*disadvantaged* citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control." *Griswold*, 381 U.S. at 503 (White, J., concurring)(emphasis added).

16. In United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820), Chief Justice Marshall stated: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals. . . ." *Id.* at 93. In McBoyle v. United States, 283 U.S. 25 (1931), the Court narrowly construed the term "motor vehicle" and held that the National Motor Vehicle Theft Act did not apply to airplanes. Justice Holmes said: "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 27. In Johnson v. Southern Pac. Co., 196 U.S. 1 (1904), the Court refused to construe a statute strictly because such a narrow construction would limit its remedial aspect.

17. In Bouie v. City of Columbia, 378 U.S. 347 (1964), the South Carolina Supreme Court had upheld the conviction of black demonstrators who sat in a restaurant booth that barred blacks from being served. The statute at issue made it a misdemeanor to enter lands of another after notice from the owner prohibiting entry. The court construed the statute to cover not only the act of entry on the premises after receiving notice not to enter, but also the act of remaining on the premises after receiving the notice to leave. Except by way of a judicial enlargement, there was nothing in the statute to indicate that it also prohibited the act of remaining on the premises after being asked to leave. The United States Supreme Court struck down the principle that a judicial enlargement of a criminal statute can be applied retroactively. This case shows how the Supreme Court has traditionally rejected unfair enforcement of criminal statutes. *See also* Skinner v. Oklahoma, 316 U.S. 535 (1942).

18. 381 U.S. 479 (1965).

19. 106 S. Ct. at 2858 (citing *Griswold*, 381 U.S. at 485).

tection of *Eisenstadt v. Baird*.[20] The Court's narrow focus upon homosexual sodomy indicates in itself that it would be constitutionally difficult to uphold a statute that invades the bedrooms of heterosexual adults.

Hardwick relied upon the prior cases to assert that the conduct prohibited by the Georgia statute falls within the boundaries of protected privacy. But the Court rejected this argument, and concluded that the rights pronounced in the prior cases do not extend to homosexual sodomy. It distinguished the present case from the prior cases on the ground that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . ."[21] All the prior cases, the Court stated, protect family, marriage, or procreation, but not homosexual activity; and, therefore, the present case had no connection with the prior cases.[22]

The connection that the Court did not see, however, was visible to four dissenting members of the Court who were willing to look below the surface of the prior cases. They saw that the common thread that ties together the rights protected in the prior cases is the concept of privacy. The Constitution protects an individual's decisions regarding marriage,[23] procreation,[24] contraception,[25] and abortion[26] primarily because these decisions, made within the bounds of privacy, constitute the core of an individual's life.[27] These rights, therefore, protect in a fundamental way vital private decisions of individuals and not merely stereotypical households.[28]

Thus, the rights protected in the prior cases, considering that they all are essential manifestations of privacy, bear a close resemblance to the claimed right to engage in homosexuality. There is, however,

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20. 405 U.S. 438, 453 (1972); *see also Hardwick*, 106 S. Ct. at 2858 (Stevens, J., dissenting). In fact, the Court recently denied certiorari in a state court decision holding unconstitutional an Oklahoma "Crimes Against Nature" statute which had been applied to heterosexual acts of sodomy. Post v. State, 715 P.2d 1105, *reh'g denied*, 717 P.2d 1151, *cert. denied sub nom.* Oklahoma v. Post, 107 S. Ct. 200 (1986) (moral repugnance does not create a compelling justification for state invasion of a privacy interest, citing *Eisenstadt* and *Griswold*).

21. *Hardwick*, 106 S. Ct. at 2844.

22. *Id.*

23. Loving v. Virginia, 388 U.S. 1 (1967).

24. Skinner v. Oklahoma, 316 U.S. 535 (1942).

25. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

26. Roe v. Wade, 410 U.S. 113 (1973).

27. 106 S. Ct. at 2851 (Blackmun, J., dissenting).

28. *Id.*

no common bond even among the protected rights. Procreation, for example, bears no resemblance to abortion. Likewise, the right of unmarried couples to use contraceptives has no connection with child rearing and education.[29] The Court's focus upon specific rights rather than privacy obscures the reason for which these rights are protected. For if the string of privacy is broken, these distinct rights will scatter.

Even assuming that the Court's line of reasoning is valid, a close analogy exists between the protected right of the unmarried couples to use contraceptives[30] and the claimed right to engage in homosexuality. First, the right to use contraceptives implies that individuals may engage in nonprocreational sexual conduct. Thus, heterosexual activity with the use of contraceptives is similar to acts of homosexuality insofar as both types of sexuality are nonreproductive. Second, both heterosexuals and homosexuals may use contraceptive devices essentially for the same purpose, that is, to avoid sexually transmitted diseases. Hence, while it might be conceded that the claimed right to engage in homosexuality does not promote procreation, marriage, or family, neither does the protected right of unmarried couples to use contraceptives.

As the Court refused to see these connections between the rights protected in the previous line of cases and the claimed right in *Hardwick*, it is apparent that the Court did not carefully scrutinize the intrinsic nature of these related privacy rights. It seems as if the Court has concluded that constitutionally protected privacy rights can be exercised by heterosexuals only. There is no constitutional basis for treating homosexuals with unjustified contempt by completely denying them the right of privacy — "the most comprehensive of rights and the right most valued by civilized man."[31]

This unequal treatment of homosexuals is not only regrettable, but will be hard to justify under the fourteenth amendment. In *Skinner v. Oklahoma*,[32] the Court held unconstitutional a statute that authorized the sterilization of persons previously convicted of larceny but not those convicted of embezzlement. Rejecting this artificial distinction between intrinsically similar crimes, the Court mandated

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29. Meyer v. Nebraska, 262 U.S. 390 (1923).

30. Eisenstadt v. Baird, 405 U.S. 438 (1972).

31. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

32. 316 U.S. 535 (1942); *see also* Reynolds v. Sims, 377 U.S. 533 (1964) (vote-diluting discrimination caused by reapportionment); Mclaughlin v. Florida, 379 U.S. 184 (1964) (statute prohibiting interracial couple from living in same room); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating poll tax); United States v. Kras, 409 U.S. 434 (1973) (holding that filing fees deny indigents equal protection access to court system); United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971) (discriminatory classifications in statutes subject to strictest possible review).

strict scrutiny of a classification that treats unequally those who commit offenses that are essentially the same. This unequal treatment by the state, the Court further said, "[was] as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[33]

The *Skinner* holding undermines the distinction the *Hardwick* Court draws between homosexual sodomy and heterosexual sodomy. Such a distinction violates the Equal Protection Clause not only because it treats unequally sexual acts that are essentially the same, but more importantly, because it singles out homosexuals for oppressive treatment.

Nonetheless, the Court refused to grant any relief under the Equal Protection Clause because the respondent had failed to specifically invoke it in the courts below.[34] Even if it is conceded that such refusal is maintainable on technical grounds, the question remains whether the Court itself, by creating an artificial and indefensible distinction between homosexual and heterosexual sodomy, can employ a course of legal reasoning that squarely conflicts with the letter and spirit of this most significant clause of the Constitution.[35] It is submitted that when a court refuses to grant relief under the Equal Protection Clause on the ground of failure to invoke it below, the court is still under a constitutional obligation to reject a line of legal reasoning which in itself violates the Clause. Given that the court has limited its analysis of an issue to a specific clause of the Constitution does not mean that the court is now free to throw away the entrenched constraints of those clauses of the Constitution which are not now before the court.[36]

Likewise, the Court declined to consider the eighth amendment issue because the respondent did not specifically raise it below.[37] The Georgia statute authorizes a court to imprison a person for up to twenty years for a single consensual act of sodomy, even if the act is done within the private setting of a home. In the words of Justice

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33. *Skinner*, 316 U.S. at 541.

34. *Hardwick*, 106 S. Ct. at 2846 n.8.

35. In People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), the New York Court of Appeals rejected the distinction between heterosexual sodomy and homosexual sodomy and stated: "[B]ecause [the statute] permits the same conduct between persons married to each other without sanction, we agree [that outlawing homosexual sodomy] violates . . . the right to equal protection of the laws guaranteed them by the United States Constitution." *Id.* at 485, 415 N.E.2d at 938-39, 434 N.Y.S.2d at 949.

36. *See infra* text accompanying notes 109-13.

37. *Hardwick*, 106 S. Ct. at 2846 n.8.

Powell, who otherwise joined the opinion of the Court, this unusual punishment creates "a serious Eighth Amendment issue."[38] He also noted the "moribund character" of laws that criminalize such private, consensual conduct.[39] More than half of the states have repealed similar statutes, and the others that still have them on the books have shown little interest in their enforcement.[40] Even in Georgia, the statute has not been enforced for several decades.[41]

In view of these facts brought out by Justice Powell, it is not clear why he joined the majority if the only practical effect of the decision was to make an abstract moral statement out of a socially dead law. Further, if legal officials have little interest in the enforcement of sodomy statutes, it follows that these laws represent norms of moribund morality. In fact, nonenforcement of these statutes suggests that society tolerates homosexuality, and that the statutes have failed to take into account the changes in notions of contemporary morality. This, Justice Powell might have noticed, weakens the Court's argument that the law "is constantly based on notions of morality."[42]

Even though sodomy statutes are not generally enforced, the Court's ruling legitimizes moral condemnation of homosexuality. This moral condemnation will surely intensify discrimination that already exists against homosexuals in matters of housing and jobs. Indeed, it will be ironic if the *Hardwick* rule generates a new wave of discrimination against homosexuals while the sodomy statutes remain unenforced.

From a sociological viewpoint, what perhaps is more disturbing is the unintended hypocrisy the majority decision would generate among some members of the community. Now even heterosexual sodomites, hostile to homosexuality, would have a legal excuse to chide homosexual sodomites. Surely, it was not difficult for the Court to foresee that the decision would reinforce, if not encourage, double standards in the community.

Roots of Sexual Privacy

What was at stake in this case was not the morality of a moribund statute, but the right to sexual privacy. Rights of privacy pronounced in prior cases are not explicitly mentioned in the text of the Constitution.[43] The creation of new rights, the Court says, does not depend

38. *Id.* at 2847 (Powell, J., concurring).
39. *Id.* at 2848 n.2.
40. *Id.*
41. *Id.*
42. *Id.* at 2846.
43. *Id.*

merely upon "the justices' own choice of values."[44] Thus, the Court correctly points out that even though it is equally indefensible to deny a right because it offends the Justices' personal sense of morality, there must be some principled method to declare rights that cannot be directly derived from the language and design of the Constitution.[45] The Court recognized two criteria to identify the nature of rights that qualify for heightened judicial protection. First, a right is fundamental if it is deeply rooted in the history and tradition of our nation.[46] Second, a right is fundamental if it is implicit in the concept of ordered liberty.[47]

This section discusses the first criterion, as outlined in *Moore v. East Cleveland*,[48] and argues that the right to sexual privacy is rooted in all civilized traditions including that of the United States. However, one caveat is necessary. The mere fact that a right has been historically denied does not justify its continued denial.[49] For instance, black children were denied for centuries the right to attend integrated public schools.[50] History and tradition do not always yield

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44. *Id.* at 2844.

45. *Id.* In Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986), Justice White, writing for the four dissenting members of the Court, said:

> [T]his Court does not subscribe to the simplistic view that Constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective intention of the Framers . . . . In particular, the Due Process Clause of the Fourteenth Amendment, which forbids the deprivation of 'life, liberty, or property without due process of law,' has been read by the majority of the Court to be broad enough to provide substantive protection against State infringement of a broad range of individual interests.

Id. at 2193-94 (White, J., dissenting).

46. *Hardwick*, 106 S. Ct. at 2844-46.

47. *Id.*

48. 431 U.S. 494 (1977).

49. Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as *the traditions from which it broke.*

Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)(emphasis added); *see also* Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897). Holmes stated that:

> [I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

50. *But see* Brown v. Board of Educ., 347 U.S. 483 (1954).

a satisfactory theory to identify rights. Nonetheless, this inquiry may provide useful insight into the dynamics of social values.

The need for privacy is rooted in the very definition of a human being. While monks might need seclusion for meditation, and, indeed, for resolving issues of morality, people in general need privacy for more mundane activity.[51] Individuals often crave for privacy so they can be alone with someone they love. Privacy nurtures sexual intimacy — a key relationship of human existence central to the development of human personality.[52] This yearning to be alone for intimate love is not prompted by an urge to engage only and always in reproductive sexual conduct. In fact, human beings develop intense and enduring personal relationships primarily because they possess the capacity for delightful sexuality not necessarily tied to the procreative function.[53]

Any governmental intrusion, therefore, that affects intimate human bonds must be viewed with great suspicion.[54] Only under exceptional circumstances can the government justify regulating human choices regarding how love ought to be expressed and to whom. The mere breach of conventional sexual morality[55] does not constitute an exceptional circumstance. Thus, in *Loving v. Virginia*,[56] the Court held unconstitutional the statutes that prohibited marriages between whites and blacks. By making interracial marriage illegal, these statutes had failed to appreciate that individuals can develop sexually and emotionally fulfilling relationships even across

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51. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). About a century ago, the authors recognized the right to privacy in the following words:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.

Id. at 214-15.

52. Paris Adult Theatre 1 v. Slayton, 413 U.S. 49, 63 (1973); *see also* Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977).

53. I. EIBL-EIBESFELDT, LOVE AND HATE 155-69 (1972). *See generally* ARISTOTLE, NICOMACHEAN ETHICS, BOOK VIII.

54. *See generally* A. MILLER, THE ASSAULT ON PRIVACY (1971); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

55. Professor Hart distinguishes between positive morality and critical morality. While positive morality constitutes moral norms actually accepted and shared by a given social group, critical morality evaluates the existing social institutions including the norms of positive morality. If norms of positive morality allow, for example, the persecution of a racial or religious minority, critical morality would justify the disintegration of such norms of positive morality. Thus any claim to enforce norms of positive morality cannot be justified by simply showing that the majority accepts and shares these norms. These norms must be justified under the principles of critical morality. *See* H. HART, LAW, LIBERTY, AND MORALITY 18-24 (1966). Professor Dworkin makes a similar distinction. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 53 (1977).

56. 388 U.S. 1 (1967).

traditionally forbidden boundaries.[57]

The individual interest in privacy becomes especially fundamental in an American culture that thrives on diversity and protects individual liberty. An essential feature of individual liberty is self-respect. As defined by John Rawls, self-respect is a "person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out."[58] Thus, any defensible concept of individual liberty recognizes "a privacy interest with reference to certain *decisions* that are properly for the individual to make."[59] It rejects state paternalism that imposes unjustified restrictions on individual choices, especially in the sphere of human love and intimate relationships. "[A] necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."[60] It is the "American heritage of freedom . . . that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."[61]

This right of privacy rooted in American history and tradition, not sodomy, much less homosexual sodomy, was at issue in *Hardwick*. By invoking the right of privacy, Hardwick was not asking the Court to declare that sodomy is a fundamental right, but only that such

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57. H. HART, *supra* note 55, at 18-22.

58. J. RAWLS, A THEORY OF JUSTICE 440 (1971).

> [S]elf-respect implies a confidence in one's ability, so far as it is within one's power, to fulfill one's intentions. When we feel that our plans of life are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can we continue in our endeavors. It is clear then why self-respect is a primary good. Without it nothing may seem worth doing . . . . All desire and activity becomes empty and vain, and we sink into apathy and cynicism.

Id.

In Stanley v. Georgia, 394 U.S. 557 (1969), the Court seems to uphold the notion of self-respect when it stated that:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

Id. at 564-65, (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

59. *Hardwick*, 106 S. Ct. at 2850 (Blackmun, J., dissenting).

60. *Id.* at 2852.

61. Fitzgerald v. Porter Memorial Hosp., 523 F.2d 716, 719 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976); *see also Hardwick*, 106 S. Ct. at 2858 (Stevens, J., dissenting).

conduct falls within the precincts of privacy. Further, Hardwick did not ask the Court even to approve of sodomy, but simply to ignore it as protected private conduct. In other words, Hardwick attacked the constitutionality of the statute not to prove that the sexual conduct watched by the Georgia policeman is a fundamental liberty, but to show that the state has no defensible excuse to watch people performing sexual intercourse in the privacy of their homes.

The Court, however, neglected to consider the issues of privacy the case presented, and proceeded to condemn homosexual sodomy. Of course, the Court is correct in saying that sodomy is not deeply rooted in this Nation's history and tradition. But this line of analysis must fail because neither using contraceptives,[62] nor obtaining abortion,[63] nor viewing obscene materials within the precincts of privacy[64] is rooted in our Nation's history or tradition. These acts are tolerated because they constitute essential manifestations of an ancient right, the right to privacy.

It is submitted that the right of sexual privacy is not only rooted in human history and tradition, but also in the biological origins of human beings. Studies of animal behavior show that our instinctive desire for privacy derives from our evolutionary heritage.[65] Human beings are not the only ones who seek privacy; all living creatures do. When monkeys fear a possible invasion within their private borders, they shriek to scare off the intruders.[66] African antelopes and American dairy cattle space themselves to establish private zones.[67] When rats are overly crowded in cages, they become aggressive, fight and indulge in sadistic sexual conduct.[68] Animals seek privacy for seclusion as well as for playing, hiding, copulating and developing small-group intimacy;[69] so do human beings.

The desire for privacy in general and sexual privacy in particular exists in all societies. Human beings in general copulate in privacy. Only in a few cultures do people perform the sexual act in public.[70]

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62. Eisenstadt v. Baird, 405 U.S. 438 (1978); Griswold v. Connecticut, 381 U.S. 479 (1965).

63. Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986); Roe v. Wade, 410 U.S. 113 (1973).

64. Stanley v. Georgia, 394 U.S. 557 (1969).

65. A. WESTIN, PRIVACY AND FREEDOM 8 (1967).

66. *Id.* "Studies of territoriality have even shattered the romantic notion that when robins sing or monkeys shriek, it is solely for the 'animal joy of life.' Actually, it is often a defiant cry for privacy, given within the borders of the animal's territory to warn off possible intruders." *Id.* (footnotes omitted).

67. *Id.*; *see also* R. ARDREY, THE TERRITORIAL IMPERATIVE (1966).

68. A. WESTIN, *supra* note 65, at 9.

69. *Id.*; *see also* E. HALL, THE HIDDEN DIMENSION (1966).

70. A. WESTIN, *supra* note 65, at 14. Formosans and Yapes of the Pacific perform sexual acts openly in public. "Even here, Formosans will not have intercourse if children are present, and Yapes couples are secluded when intercourse takes place, though they do not seem to mind the presence of other persons who may come on the scene." *Id.* at

Even in the so-called primitive cultures, the need for privacy is equally imperative. Among the Siriono Indians of Eastern Bolivia, for example, due to overcrowding in huts, the sexual intercourse takes place "more often in some secluded nook in the forest."[71]

Human beings need privacy not only to engage in activity generally approved by the community, but also to protect intimate personal secrets which, if exposed, "would leave [them] naked to ridicule and shame."[72] Every individual feels the need to conduct some activities behind the veil of privacy. This private activity is imperative for physical relaxation, mental health and indeed for the development of individual personality.[73] Numerous suicides and nervous breakdowns resulting from forced governmental intrusions "constantly remind a free society that only grave social need can ever justify destruction of the privacy which guards the individual's ultimate autonomy."[74]

ORDERED LIBERTY

If the text of the Constitution does not directly recognize a fundamental right, the Court may pronounce the existence of such a right if it is "implicit in the concept of ordered liberty."[75] This principle, declared by Justice Cardozo in *Palko v. Connecticut*,[76] was designed to incorporate some provisions of the Bill of Rights into the fourteenth amendment. Even though this principle has been invoked to invalidate state procedures that violate notions of the "Anglo-American regime of ordered liberty,"[77] its reach is not purely procedural. On its basis, even the substance of state laws has been struck down.[78]

The thesis that the full scope of liberty goes beyond the specific

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14-15.

71. *Id.* at 15.

72. *Id.* at 33.

> Each person is aware of the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality. In addition, there are aspects of himself that the individual does not fully understand but is slowly exploring and shaping as he develops. Every individual lives behind a mask in this manner; indeed, the first etymological meaning of the word 'person' was 'mask', indicating both the conscious and expressive presentation of the self to a social audience.

Id.

73. *Id.*

74. *Id.* at 34.

75. *Hardwick*, 106 S. Ct. at 2844.

76. 302 U.S. 319 (1932).

77. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 569 (1978).

78. *Id.*

guarantees provided in the Constitution is fully alive and well.[79] In *Griswold v. Connecticut*,[80] three Justices agreed that the unmentioned right of privacy is imbedded in the concept of liberty, invoking, as a rule of construction, the ninth amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[81] In *Roe v. Wade*,[82] all nine Justices "accepted the Court's role in giving the fourteenth amendment due process clause substantive content beyond the Bill of Rights, despite significant disagreement over exactly how the role should be performed."[83]

Philosophically, the substantive elements of ordered liberty are elusive.[84] Even though the concept of ordered liberty is susceptible to differing interpretations depending on the imagination and value choices of the interpreter, the conduct prohibited by the Georgia statute falls within the boundaries of ordered liberty.

Ordered liberty in a pluralistic, democratic society is founded neither upon an officially pronounced state ideology, nor always upon majoritarian sentiments.[85] In essence, ordered liberty is a concept that strikes a balance between individual liberty and social order. Historically, the interests of the unelected rulers and the sentiments of the majority have been the traditional foes of individual liberty.[86] As John Stuart Mill clarified, even in a democracy where rulers are elected and the legislature is accountable to the community, the limitation of the power of the government over individuals does not lose its importance.[87] The concept of ordered liberty as a scale to measure the importance of individual liberty against the needs of social order, therefore, remains a powerful tool to limit both the authority of the magistrate and the majority.[88]

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79. *See* Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting): "Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source." The majority opinion of Justice Brennan in Smith v. Org. of Foster Families, 431 U.S. 816 (1977), quoted with approval Justice Stevens' formulation of individual liberty. "The liberty interest in family privacy has its source . . . not in state law, but in intrinsic human rights." *Id.* at 845.

80. 381 U.S. 479 (1965). Justice Goldberg, concurring in an opinion joined by Chief Justice Warren and Justice Brennan, rooted the right of privacy in the concept of liberty. *Id.* at 488-93.

81. U.S. CONST. amend. IX.

82. 410 U.S. 113 (1973).

83. L. TRIBE, *supra* note 77, at 572.

84. *Id.* at 572-73. Professor Tribe argues that none of the theories offered to support fundamental rights are wholly satisfying. References to history, tradition, and the concept of ordered liberty provide useful insights, but do not yield a satisfactory model to identify these rights.

85. *Id.* at 893.

86. J.S. MILL, ON LIBERTY 3-19 (C. Shields ed. 1956).

87. *Id.* at 6.

88. *Id.* at 7.

The fundamental principle animating the fourth amendment protection, for example, safeguards the privacy and security of individuals against arbitrary invasions by government officials.[89] The requirement of a search warrant upon determination of probable cause strikes a balance between the "too precious"[90] character of privacy and the state's interest in arresting criminals.[91] Further, the fourth amendment limits the authority of government because "[h]istory shows that all officers tend to be officious."[92]

But individual protection against the excesses of governmental officials is not enough. Individuals, in order to freely define their identity and choose suitable lifestyles, also need protection against the imposition of majoritarian sentiments.[93] Thus, ordered liberty as a principle is not only useful in balancing individual liberty against state interests but also individual freedom against collective moral-

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> Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.

Id.

89. See v. City of Seattle, 387 U.S. 541 (1967). In Olmstead v. United States, 277 U.S. 438 (1928), *rev'd*, 389 U.S. 347, 352 (1967), Justice Brandeis, in his dissent, warned us against the unbridled use of discretion by governmental officials:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Id. at 479 (Brandeis, J., dissenting).

90. McDonald v. United States, 335 U.S. 451, 455 (1948).

91. *Id.* at 455.

92. Frank v. Maryland, 359 U.S. 360, 382 (1959) (Douglas, J., dissenting), *rev'd*, 387 U.S. 523, 528 (1966).

93. S. FREUD, CIVILIZATION AND ITS DISCONTENTS (J. Strachey trans. 1961) (Germany 1930). In an illuminating passage, Freud expresses human sexuality in the following words:

> As regards the sexually mature individual, the choice of an object is restricted to the opposite sex, and most extra-genital satisfactions are forbidden as perversions. The requirement, demonstrated in these prohibitions, that there shall be a single kind of sexual life for everyone, disregards the dissimilarities, whether innate or acquired, in the sexual constitution of human beings; it cuts off a fair number of them from sexual enjoyment, and so becomes the source of serious injustice.

Id. at 51.

ity. Individual liberty is threatened most when the legislature, by the force of a criminal statute, imposes majoritarian morality upon all members of a diverse community. This, in a secular state, is an illegitimate use of coercive power.

This principle was epitomized in *Wisconsin v. Yoder*.[94] The Court declared: "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[95] In *Yoder*, the Amish children, it might have been argued, were harmed by the deprivation of extended formal schooling. The Court, however, declined to impose upon the Amish, even if their choices were odd or erratic, the majoritarian ideal of a good life. Further, and no less significantly, the Court refused to "permit the state to define as harmful anything it might deem undesirable."[96]

The *Yoder* principle restates Mill's famous doctrine, "that the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others."[97] This harm principle when applied to sexual activity curtails individual liberty to commit rape and other such acts that inflict physical injury upon others. Nevertheless, it also limits the reaches of popular sexual morality and allows consenting adults to establish meaningful sexual relationships that are atypical but do not hurt others.[98]

Only upon showing of a tangible harm can individual liberty be limited. The mere distress caused "by the bare thought that others are offending in private against [popular] morality cannot constitute 'harm,' except in a few neurotic or hypersensitive persons who are literally 'made ill' by [homosexuality]."[99] In *Hardwick*, the dissenting Justices reaffirmed the harm principle when they stated that the right to differ needs the most protection when individual "choices upset the majority."[100] Likewise, in *O'Connor v. Donaldson*,[101] the

94. 406 U.S. 205 (1972).
95. *Id.* at 224.
96. L. TRIBE, *supra* note 77, at 857.
97. J.S. MILL, *supra* note 86, at 13.
98. *See* H. HART, *supra* note 55, ch. 1.
99. *Id.* at 46. One may invoke the harm principle to argue that a state may lawfully prohibit homosexual sodomy because homosexual activity poses a public health threat due to the AIDS problem. This argument is fallacious. First, the AIDS virus is gender neutral. It affects both homosexuals and heterosexuals. Thus individuals carrying the virus make up a distinct class that presents a threat to public health. While the state may arguably regulate sexual activity of those afflicted with the virus, it would be indefensible to prohibit sexual activity among people who do not carry the virus, be they heterosexual or homosexual. Second, harm to public health is distinguishable from mere moral harm. The harm principle recognizes that AIDS-related sexual activity may pose a public health threat. But private sexual conduct that offends others in a moral sense only cannot constitute a public health threat.
100. *Hardwick*, 106 S. Ct. at 2854.
101. 422 U.S. 563, 575 (1975).

Court upheld the harm principle and declared that "mere public intolerance or animosity cannot constitutionally justify" involuntary confinement of a mentally ill person who does not harm others.

There is no need to refute the harm principle by arguing that a logical extension of the principle would allow individuals to engage in consensual sexual acts even in public. In this regard, the old distinction between private immorality and public indecency limits the logical excesses of the harm principle.[102] On grounds of public decency, for example, state laws may properly prohibit people from walking nude on the streets. But such laws would be overly coercive if they punish people for walking bare in their living rooms.[103]

The moral majority has a legitimate argument that sexual acts offensive to general feelings should not take place in public. But when it stretches this argument to regulate private sexuality, it clearly overstates the needs of popular morality and public decency. The bare knowledge that individuals in their homes are acting in a manner offensive to the moral majority does not confer on the moral majority a right to be protected from such distress. "No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned."[104]

This Article does not attempt to judge whether unconventional sexual activity is morally good. Such moral judgments are legally irrelevant. Nor is it argued that the public in general ought to approve of atypical sexual behavior. Criticisms, based on religious or other moral grounds, of sodomy in general and even homosexual sodomy in particular, are protected under the first amendment. But any

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102. *See* H. HART, *supra* note 55, at 44. Professor Hart states that the Romans distinguished the province of the Censor, concerned with morals, from that of the Aedile, concerned with public decency. In the sixth century, Islamic law made a similar distinction; the harsh punishment for fornication was inflicted only if the sexual act was done in the presence of four male eye witnesses. Since rarely a private sexual act is done in the presence of four men, an important consideration in punishing such an act was to curb public indecency.

103. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981). The New York Court of Appeals declared unconstitutional the New York statute that prohibited consensual sodomy. It made a distinction between public indecency and private immorality by suggesting that an act offensive to the majoritarian sentiments may be prohibited in public but not within the precincts of a private setting. The court relied upon Eisenstadt v. Baird, 405 U.S. 438 (1972) to show a similar distinction drawn by the Supreme Court of the United States "between public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of the public arena and in the sanctum of the private home." *Onofre*, 51 N.Y.2d at 489, 415 N.E.2d at 941, 434 N.Y.S.2d at 952.

104. H. HART, *supra* note 55, at 46.

criticism based on conventional morality does not justify the launching of a legal crusade,[105] especially in a secular state, to outlaw atypical but consensual sexual activity among adult individuals in the privacy of their homes.[106] In *Palmore v. Sidoti*,[107] the Court stated: "The Constitution cannot control [social] prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[108]

In a secular, democratic society, the principle of ordered liberty respects the moral, intellectual, spiritual and aesthetic uniqueness of each individual; it forbids standardization of lifestyles and loathes social duplicating of human beings. This has been our most powerful argument against both theocratic and totalitarian regimes.

THE FULL WEIGHT OF THE CONSTITUTION

Under the full weight of the Constitution, the issue presented in *Hardwick* should raise several constitutional questions. First, whether the conduct prohibited by the Georgia statute falls within the precincts of the right to privacy pronounced in the prior cases. Second, whether the people have retained their right to make sexual choices under the ninth amendment. Third, whether the severity of the punishment prescribed by the statute is cruel and unusual under the eighth amendment. Fourth, whether a discriminatory enforcement of the statute only against homosexuals violates the Equal Protection Clause of the fourteenth amendment.

In *Hardwick*, the Court declined to consider whether the statute violates the eighth amendment, the ninth amendment or the Equal Protection Clause of the fourteenth amendment because Hardwick had not invoked these grounds in his challenge to the statute in the lower courts. Thus, the Court limited its analysis only to a few principles of the Constitution to declare that Hardwick had no cognizable claim. The dissenting Justices, on the other hand, argued that the procedural posture of the case required that the statute be struck down if there was *any* constitutional ground available.[109]

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105. Both Ronald Dworkin and Graham Hughes have ably argued that the right of the individual to make moral choices is protected against what the majoritarian process would dictate. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Note, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962). *See generally* R. DWORKIN, *supra* note 55.

106. *Onofre*, 51 N.Y.2d at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 952-53.

107. 466 U.S. 429 (1984).

108. *Id.* at 433.

109. *Hardwick*, 106 S. Ct. at 2849 (Blackmun, J., dissenting). This case was before the court on petitioner's motion to dismiss for failure to state a claim under Rule 12(b)(6). Justice Blackmun stated that respondent is entitled to relief on any available ground, even if he has not specifically relied upon that ground. He cited a number of cases to show that it is a well settled principle of law that a complaint should not be dismissed for its failure to rely upon a supportive legal theory and that a court is under a

At this point, it will be instructive to draw a distinction between *thin* and *thick* analysis of a constitutional issue.[110] If a court decides an issue by applying *all* relevant constitutional principles, then the court is engaging in thick analysis. In other words, the thick analysis resolves the issue under the full weight of the Constitution. But if the court does not apply the full force of the Constitution and decides the issue on the basis of only a *few* of the applicable constitutional principles, then the court is engaging in thin analysis.

Ordinarily, a court may use thin analysis to resolve the question presented if the litigants themselves have made no efforts to invoke all the applicable rules and principles. The courts cannot prosecute the case on behalf of the litigants. Nor can they assume the herculean task of resolving each constitutional issue on the basis of thick analysis. The thin analysis may also be an appropriate judicial strategy when the court has an intuitive sense that the result would not be any different even if it engages in the thick analysis.

On the other hand, when the issue presented involves a claimed fundamental liberty, the thin analysis can be justified only if the court is certain that thick analysis would also yield a similar result. It is suggested, however, that if the application of the full weight of the Constitution would radically change the outcome of the case, the court may decline to employ thin analysis. Two arguments are submitted in support of this suggestion.

First, thin analysis saves judicial time and energy. But when a fundamental liberty is at issue, judicial economy becomes a secondary consideration. When the Supreme Court leaves out from consideration important constitutional principles and is not certain how the case would come out under the full impact of applicable constitu-

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duty to examine the complaint to determine if relief can be given on any possible theory.

110. C. GEERTZ, THE INTERPRETATION OF CULTURES (1973). Geertz explains the concept of thick description to argue that culture is essentially a semiotic reality. "Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning." *Id.* at 5. This explanation provides a useful insight into the constitutional scheme of protected liberties. The thick description of liberty presupposes the Constitution to be internally coherent and organic in meaning. Any interpretation of the Constitution that first cuts it into pieces and then uses only a few threads to weave the concept of liberty indeed tears off the intricate web of a seamless reality.

Professor Dworkin presents a similar theory to argue that judges while deciding hard cases must take into consideration the whole character of the constitutional enterprise, and not just a few selective rules. "The law may not be a seamless web; but the plaintiff is entitled to ask Hercules [the most skillful judge] to treat it as if it were." R. DWORKIN, *supra* note 55, at 116.

tional principles, the thin analysis is judicially uneconomical. Such an analysis invites future litigation on essentially the same issue. For instance, the question of homosexual activity can always appear before the Court on the basis of the eighth amendment, the ninth amendment and the Equal Protection Clause.

Second, even though certain liberties can be identified in specific constitutional provisions, the concept of liberty is imbedded in the organic design of the Constitution.[111] In other words, the Constitution as an internally coherent document embodies a thick concept of liberty that cannot be read plainly from the text of the Constitution. It follows that a claim involving a fundamental liberty that is not specifically mentioned in the Constitution, such as the right to sexual privacy, can be meaningfully settled only by applying the full weight of the Constitution. When the Court denies a claimed fundamental liberty by using only cuts and pieces of the Constitution, it distorts not only the jurisprudence of rights, but the organic nature of the Constitution as well. Further, such thin analysis creates confusion both in the general public and the legal profession, and makes it difficult to understand what the Court is trying to achieve especially when the Court is divided five to four.

The thin analysis used by the *Hardwick* Court seems unjustified because a claimed fundamental liberty was at stake. It is highly probable that the statute might have been struck down, if the Court had applied the full weight of the Constitution. For instance, Justice Powell, in his concurring opinion, indicated that the Georgia statute posed "a serious Eighth Amendment issue."[112] The statute is equally vulnerable under the ninth amendment and the Equal Protection Clause. It is suggested that the Court take rights seriously. The thin analysis "makes for a short opinion, but it does little to make for a persuasive one."[113]

CONCLUSION

This Article draws four conclusions. First, the Supreme Court in *Bowers v. Hardwick* twisted the issue in order to single out homosexuals for unjustified moral condemnation. It used moral rhetoric to deny them their claimed right to sexual privacy. Second, the Court upheld a criminal statute although it inflicts special harm on a politically disadvantaged group. Third, the Court's analysis is indefensible because the right to sexual privacy is rooted both in this Nation's history and tradition. It is also implicit in the concept of ordered liberty. Fourth, the Court's use of thin analysis to deny a claimed

111. *See* R. DWORKIN, *supra* note 55, at 131-49.
112. *Hardwick*, 106 S. Ct. at 2847 (Powell, J., concurring).
113. *Id.* at 2850 (Blackmun, J., dissenting).

fundamental liberty creates confusing jurisprudence. Thus, the statute held to be constitutional on the basis of thin analysis might well turn out to be unconstitutional on the basis of thick analysis.